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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE  
Attorney General Opinion No. 12-IIB11  
November 7, 2012

VIA EMAIL AND REGULAR MAIL

Mr. Gerald A. Lechliter  
44 Harborview Road  
Lewes, DE 19958-1244  
GLEchliter@aol.com

Re: FOIA Petition Against City of Lewes

Dear Mr. Lechliter:

We have received and hereby respond to your petition to the Attorney General for a written determination regarding the City of Lewes (the “**City**”) and, specifically, whether the City Council (the “**Council**”) violated certain “open meeting” requirements set forth in Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10006 (“**FOIA**”).<sup>1</sup> For the reasons discussed below, and based on our review of certain records provided to us, we have determined that your petition is untimely.

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<sup>1</sup>The Council is a “public body” within the meaning of FOIA. *See* 29 *Del. C.* § 10002(h). As such, the Council is subject to the open meeting requirements of FOIA. *See* 29 *Del. C.* § 10004.

## INTRODUCTION

The instant FOIA dispute is the latest iteration of a long-standing dispute between you, on the one hand, and the City, the University of Delaware (“UD”) and a host of other government agencies and individuals, on the other hand.<sup>2</sup> The disagreement, at its core, concerns the planning, approval and construction of a wind turbine within the jurisdictional limits of the City. The turbine project long ago received necessary permits and approvals, including zoning approvals from the City, and has been operational since the summer of 2010. Earlier this year, you filed a federal lawsuit in this District against the City, UD and others seeking, among other things, to have certain state and local permits and approvals for the project invalidated.

You filed the instant FOIA petition in July of this year, shortly after this Office issued its written determination in an unrelated FOIA open meeting dispute involving the Town of Dewey Beach, *Att’y Gen. Op.* 12-IB09 (July 13, 2012) (the “**Dewey Opinion**”). The focus of your petition is the January 11, 2010 Council meeting (the “**January 2010 Meeting**”), at which the Council discussed in open and executive sessions, and ultimately voted on and approved, an agreement between the City and UD concerning the turbine project.

You concede that the petition is “clearly time-barred” under this Office’s pre-Dewey Opinion determinations. You assert, however, that the Dewey Opinion changed this Office’s long-standing practice of refusing to investigate alleged open meeting violations after the expiration of the six-month deadline for voiding actions taken at a meeting in violation of FOIA. We disagree with your reading of the Dewey Opinion and conclude that your petition is untimely.

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<sup>2</sup>We note that this statement may not be accurate as of the date of this written determination. We have been informed that you recently filed a complaint in the Court of Chancery raising issues and claims related to your FOIA petition.

## **BACKGROUND**

### **Overview of the Turbine Project**

In 2008, UD commenced a feasibility study concerning a utility-scale wind turbine to be erected on or near UD's Hugh R. Sharp campus (the "**Lewes Campus**"). The study related to, among other things, the performance of wind turbines in the region, the impact on migratory fowl and the public perception of wind energy and related systems.

In July 2009, based on the favorable results of the study, UD and Gamesa Technology Corporation ("**Gamesa**"), a third-party provider of expertise and equipment for wind generation, entered into a memorandum of understanding to undertake a joint endeavor (the "**Project**") to construct, own and operate a two-megawatt wind turbine on or near the Lewes Campus (the "**Turbine**").

In October 2009, UD and Gamesa finalized a Project agreement providing for joint ownership and operation of the Turbine on then-state-owned land adjacent to the Lewes Campus. At some point, the Delaware Department of Natural Resources and Environmental Control ("**DNREC**") agreed to and did provide UD with access to and/or rights in a parcel of land to facilitate the Project.<sup>3</sup>

The Project is located within the "University District" established by the City's zoning code. Under the City's zoning laws, permitted uses for parcels falling within a University District include uses by right for research and development laboratories and certain accessory uses by special exception.

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<sup>3</sup>We note that you filed two petitions with this Office alleging that DNREC has "consistently and flagrantly" violated FOIA open meeting and public record provisions over the years. Those petitions raise arguments related to the matters addressed herein but will be addressed in a separate written determination.

At some point, presumably in 2009, UD and the City began a dialogue concerning the Project and the interaction of the Project with the City's ordinances and zoning regulations. Those discussions culminated in the negotiation of a memorandum of understanding (the "**UD-Lewes MOU**"). Pursuant to the UD-Lewes MOU, which was modified and approved by the Council at the January 2010 Meeting, the City agreed that the Project would be a permitted use for the University District. The City also agreed, as reflected in the UD-Lewes MOU, that the Project would be exempt from the specific height regulations applicable to structures in the University District.

Ultimately, UD and Gamesa obtained all necessary building and other permits and approvals from the City and other government agencies and constructed the Turbine. As noted, the Turbine has been operational since the summer of 2010.

#### **The January 2010 Agenda and Meeting**

On January 4, 2010, the Council timely posted an agenda for the January 2010 Meeting (the "**January 2010 Agenda**") referencing a number of potential action items under the headings "Unfinished Business" and "New Business." The New Business section of the January 2010 Agenda includes an express reference to the UD-Lewes MOU. It states: "*Presentation & consideration of an agreement with [UD] regarding its proposed wind research facility.*" The January 2010 Agenda also includes a section titled "Executive Session," along with a specific reference to "*Contract Negotiations.*" The very next section of the January 2010 Agenda states: "*Consideration and/or action on matters discussed in Executive Session.*"

The Council convened on January 11, 2010 for the purpose of, among other things, discussing and, if appropriate, taking action on the matters listed on the January 2010 Agenda,

including the UD-Lewes MOU. According to your written submissions to this Office, you apparently had notice of but chose not attend the January 2010 Meeting.

The minutes for the January 2010 Meeting reflect that Mayor Ford, at the beginning of the January 2010 Meeting, announced that “action on [the UD-Lewes MOU] was deferred until after Executive Session.” After addressing other matters listed on the January 2010 Agenda, the Council voted unanimously to go into executive session to discuss the UD-Lewes MOU. The Council thereafter convened in executive session to discuss the UD-Lewes MOU and potential revisions thereto with the City solicitor. After an 18-minute discussion, the Council returned to open session. Mayor Ford then explained the Project for those still in attendance by means of a question-and-answer period with a UD representative. After Mayor Ford’s presentation, the Council voted unanimously to accept the MOU, with modifications as discussed in executive session.

**Petitioner’s 2010-2011 FOIA Request and Follow-Up Inquiry**

According to the petition, you submitted a FOIA request to the City in the summer of 2010, in which you requested all of the records related to the Turbine. After receiving the City’s response, you sent an email to this Office in March 2011 asking whether the time limitations in FOIA § 10005(a) (requiring that Chancery Court suit be filed no later than 6 months after the challenged action) would preclude you from filing a petition with this Office concerning the propriety of actions taken at the January 2010 Meeting. Specifically, your March 2011 email states:

I was reviewing the . . . Council public meeting minutes from January 11, 2010, and believe the Council violated the Open Meeting section of [FOIA]. The boilerplate items listed on the Agenda . . . for discussion in the Executive Session (ES) are the following: “Potential Litigation, Personnel, [Contract Negotiation].” The Council returned from the ES

and presented/discussed the [UD-Lewes MOU]. Fine so far. Right below that summary, however, is the following statement: "Councilperson Becker made motion to accept the [UD-Lewes MOU], with modifications discussed in Executive Session, seconded by Deputy Mayor Tsantes, all voting in favor, motion carried." First, modifications to the [UD-Lewes MOU] were not listed as a topic of discussion for ES. Second, I don't believe any such modifications meet the statutory requirements for discussion in ES. I realize the statute of limitations has expired for Chancery Court action in [FOIA § 10005(a)], so no judicial remedy is available.

Can I still, however, request an AG opinion as to whether [the open meeting provisions of FOIA § 10004] were violated?

By your own admission, after speaking with someone from this Office about the issues raised in your March 2011 email, you refrained from filing a petition challenging the Council's approval of the UD-Lewes MOU "because it was clearly time-barred."

#### **The January 2012 Federal Lawsuit**

In January 2012, you filed a federal lawsuit in this District against UD, DNREC, the City and others seeking, among other things, to have the permits for the Project invalidated and the Turbine removed from its present location (the "**Federal Lawsuit**"). You allege in the Federal Lawsuit that UD obtained approvals and permits for construction of the Turbine based on "backroom negotiations" with DNREC and the City. You also allege that there was "no public hearing debating the provisions of the [UD-Lewes MOU], thereby denying you of your constitutional right to be heard and to challenge the [UD-Lewes MOU]." In the complaint, you recount in detail the events at the January 2010 Meeting, which, as previously noted, you did not attend. You did not plead a cause of action under FOIA as part of the Federal Lawsuit, which remains pending in District Court.

**The July 2012 FOIA Petition and Related Matters**

On July 28, 2012, we received your petition, in which you make four primary requests. First, you request that this Office determine whether executive sessions convened by the Council *from the present until as far back as the January 2010 Meeting* were properly noticed in light of the Dewey Opinion, which you believe requires more specificity than had sufficed in the past. Second, you ask us to investigate and determine whether the statutory grounds for holding those executive sessions were valid. Third, you ask us to determine whether the January 2010 Agenda violated FOIA based on your assertion that it failed to notify the public that the Council intended to vote to approve the UD-Lewes MOU. Finally, you request that this Office determine whether the Council violated FOIA by failing to maintain a record of the City's alleged "backroom" discussions with UD about the Project.

On August 17, 2012, we received the City's response. The City submits that your petition should be rejected outright as untimely under this Office's well-established policy and practice of declining to investigate alleged "open meeting" violations where the challenged conduct took place more than six months prior to the filing of the FOIA petition. Alternatively, the City submits that the requirements for executive session notices need not be resolved in this particular matter because the City has voluntarily agreed to comply with the notice standard announced in the Dewey Opinion going forward, pending further clarification from this Office. The City strongly urges this Office to reconsider the determination in the Dewey Opinion and submits that further remediation would be both improper and unjust given the City's good-faith reliance on prior written determinations regarding executive session notices.

On September 17, 2012, we received your sur-reply.<sup>4</sup> You raise in the sur-reply a number of new, unrelated issues that either were not mentioned at all, or which were referred to only generally, in your original petition. Specifically, you have alleged the City violated FOIA in connection with a number of public meetings held throughout calendar years 2011 and 2012. On October 5, 2012, we received the City's response, which addresses, at length, all of the additional issues raised in your sur-reply. We agree with the City that your new allegations are outside the scope of the original petition and do not address them further herein.<sup>5</sup>

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<sup>4</sup>Via email sent on August 14, 2012, this Office agreed to provide you with a copy of the City's response and granted you permission to respond to the City's arguments by way of a sur-reply.

<sup>5</sup>On November 2, 2012, we received from you a further submission in support of the arguments first raised in your sur-reply. Your new submission also appears to accuse the City solicitor of violating the Delaware Rules of Professional Conduct or otherwise acting inappropriately in this matter. Your recent submission, which we neither requested nor authorized, is not helpful or warranted. We will not address it further.



### DISCUSSION

The threshold question here is whether your FOIA petition is time-barred. We agree with the City that it is.

Under FOIA, “[a]ny citizen may petition the Attorney General to determine whether a violation of [FOIA] has occurred or is about to occur.” 29 *Del. C.* § 10005(e). FOIA does not contain an express statutory deadline by which petitioners must bring alleged open meeting violations to the attention of this Office. While FOIA § 10005(a) contains a limitations period applicable to open meeting violations, that provision, on its face, applies only to suits citizens may elect to bring in the Court of Chancery to void actions taken in violation of FOIA.<sup>6</sup> The deadlines set forth in FOIA § 10005(a) do not cabin the authority of this Office to investigate and, if appropriate, require remediation of open meeting violations. *See Att’y Gen. Op.* 06-IB01 (Jan. 4, 2006).

This Office has broad discretion in determining whether alleged open meeting violations have been timely asserted or otherwise warrant consideration. *See Att’y Gen. Op.* 97-IB23 (Dec. 23, 1997) (“While we have discretion to determine when a complaint is timely, we conclude that the delay of almost six months in this case warrants the conclusion that your complaint was not timely filed.”). In the exercise of such discretion, we have consistently declined to investigate open meeting complaints where, as here, the alleged violations took place more than six months

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<sup>6</sup>Section 10005(a) provides:

Any action taken at a meeting in violation of [FOIA] may be voidable by the Court of Chancery. Any citizen may challenge the validity under [FOIA] of any action of a public body by filing suit within 60 days of the citizen's learning of such action but in no event later than 6 months after the date of the action.

29 *Del. C.* § 10005(a).

prior to the filing of a petition under FOIA § 10005(e). *See, e.g., Att'y Gen. Op.* 02-IB10 (Apr. 24, 2002) (“As a general rule, for fairness and practical reasons, we do not investigate events that occurred more than six months before we received the complaint.”); *Att'y Gen. Op.* 05-IB26 (Aug. 29, 2005) (same).<sup>7</sup>

We believe your petition is untimely, and you have provided us with no reason to deviate from our long-standing policy and practice in this case. You had advance notice of the January 2010 Meeting. You elected not to attend. Thereafter, if not immediately thereafter, you learned that the City had approved a revised version of the UD-Lewes MOU. In the summer of 2010, after several months of delay, you submitted a FOIA request to the City requesting all of the records related to the Turbine. In March 2011, some fourteen months after the January 2010 Meeting, you considered filing a petition seeking a written determination as to whether the Council violated the open meeting provisions of FOIA in connection with the January 2010 Meeting. After speaking with someone from this Office, you opted not to pursue the matter because you determined that any such petition was “clearly time-barred.” After a further ten-month delay, you filed the Federal Lawsuit, in which you attack the Council’s actions related to the January 2010 Meeting and seek, among other things, to invalidate the UD-Lewes MOU. You did not assert any FOIA claims in the Federal Lawsuit. Finally, in July of this year, more than two years after the alleged open meeting violations, you filed the instant FOIA petition.

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<sup>7</sup>This long-standing policy, like the statutory limitations period in FOIA § 10005(a), reflects a balance of competing interests and goals. Our six-month policy affords citizens a reasonable amount of time to bring open meeting issues to our attention. It also acknowledges that citizens, businesses and public officials necessarily must rely on government decisions in planning their daily affairs. Our policy fosters finality and certainty by requiring petitioners to assert FOIA violations in a timely fashion. In contrast to the limitations period in FOIA § 10005(a), our six-month policy reflects a general guideline, not an immutable rule, and affords us flexibility in addressing open meeting violations.

We reject the attempt to avoid the consequences of the delay based on the Dewey Opinion. We did not discuss or even mention timeliness in the Dewey Opinion -- for good reason. The petitioner in the Dewey matter *timely* lodged a petition with this Office in January 2012 alleging certain open meeting violations in connection with two town council meetings convened in November 2011. *See Att’y Gen. Op.* 12-IB09 (July 13, 2012). The petitioner in that case also alleged that similar violations had occurred with respect to other meetings held in the twelve months prior to the petition date and invited us to investigate. *See id.* After determining that FOIA open meeting violations occurred with respect both November 2011 council meetings, we turned our attention to other alleged violations to gauge the scope and severity of the problem and assess remediation options. *See id.* Ultimately, we determined that the violations were “obvious, prolonged and habitual” and proposed a remedies agreement to ensure town council’s future compliance with FOIA. *See id.* Contrary to your assertion, the Dewey Opinion does not represent a departure from our well-established policies and procedures regarding the timeliness of FOIA petitions.

CONCLUSION

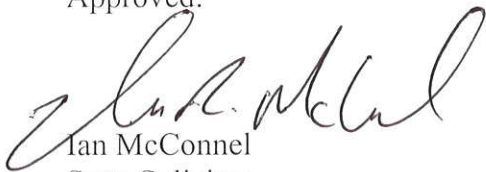
For the foregoing reasons, we have determined that your petition is untimely. Accordingly, we do not address the merits of the arguments raised in your petition.

Very truly yours,



Jason W. Staib  
Deputy Attorney General

Approved:



Ian McConnell  
State Solicitor